United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1731

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA, :

Appellee, :

against- : Docket No. 74-1731

PETER OTTLEY, :

Defendant-Appellant. :

- x

DEFENDANT-APPELLANT'S BRIEF

Respectfully submitted,

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INDEX

Table of Authorities

Statutes and Authorities

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FOR THE SECOND CIRCUIT

- x

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Preliminary Statement

Defendant Peter Ottley appeals from a judgment of conviction entered on May 6, 1974 in the United States District Court for the Southern District of New York (Frankel, J.) (16a)[1].

Defendant, an officer of a labor organization, was tried under a 46-count indictment charging various violations of the Labor Management Reporting & Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §401, et seq., and the Welfare and Pension Plan Disclosure Act, 29 U.S.C. §301, et seq. Two counts were dismissed prior to trial, twenty-one counts were dismissed at the end of the Government's case, and defendant was acquitted by the jury of all but three of the remaining twenty-three counts. The counts of which he was acquitted included all of the embezzlement counts in which he was charged as a principal (3a-15a; 141a-148a; 456a; 459a-460a).

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1. Numbers in parenthesis followed by "a" refer to the joint appendix; "T" refers to the transcript of the trial record; "Exh" refers to Exhibits introduced at trial.

Of the three counts resulting in conviction, two charged defendant with having aided and abetted another union officer in the embezzlement of union funds. The alleged embezzlement consisted of the leasing of an automobile for the use of the other officer and the payment by the union of credit card bills for gasoline used by that automobile (10a-11a).

The final count of which defendant stands convicted alleges the willful failure to maintain vouchers and receipts adequate to permit verification of the annual reports filed by the union with the Department of Labor (6a). Although defendant submitted weekly petty cash vouchers for his reimbursed expenses, and although no claim was made that he lacked authority to recover such expenses, or that the moneys were not indeed spent for the kinds of expenditures -- taxis, meals, telephones, and the like -- that are commonly described by that term, or that the amounts were improper, defendant was convicted on the theory that the submitted vouchers did not more fully set forth the breakdown of expenses and were unaccompanied by receipts or other documentation.

The Issues Presented

1. As to each of the three counts on which defendant was convicted, was the evidence sufficient to warrant submission of the case to the jury?

2. Under the two automobile leasing counts, did the charge to the jury erroneously define the elements of a crime under Section 501(c) of the LMRDA, particularly in its treatment of the concept of "union benefit" and a good faith belief that an expenditure was being made for the benefit of the union?

3. Under the record-keeping count, was the judge's charge erroneous with regard to the meaning and definition of "knowing and willful" conduct?

4. Under the record-keeping count, was defendant a person required to file reports within the meaning of the Statute and therefore subject to Section 206 of the LMRDA?

5. (a) Under the record-keeping count, did the petty cash vouchers submitted by defendant satisfy the undefined, unelaborated term "voucher" as used in LMRDA Section 206?

(b) Does Section 206 require the creation of any particular kind of voucher by a union president or merely the preservation and retention of records in existence?

(c) If Section 206 is sought to be construed to require more than defendant did, is it void for vagueness?

6. Did the trial judge commit error in admitting evidence as to literature sent by the International Union and lectures by its attorneys on the requirements of the Landrum-Griffin Act?

7. Under the record-keeping count, did the trial judge erroneously exclude evidence as to Internal Revenue Service acceptance, after audit, of the adequacy of defendant's substantiating records on reimbursed expenses?

Statement of the Case

Defendant was indicted and tried for various alleged violations of the LMRDA and the Welfare and Pension Plan Disclosure Act. Specifically, he was charged with (1) causing the union of which he was an officer to make unlawful loans to himself; (2) embezzling moneys from the union for personal purposes;

(3) embezzling moneys from the union through purchase of unauthorized insurance annuities for himself; (4) embezzling moneys for personal purposes from employee benefit funds; (5) making false statements about the foregoing and related matters in forms required to be filed with federal agencies; (6) aiding and abetting his fellow officer in the embezzlement of union funds through leasing of an automobile and payment of its gasoline charges; and (7) failing to maintain vouchers, worksheets and receipts on reimbursed expenses which are required to be reported on documents filed with the Secretary of Labor (3a-15a).

The trial began on March 1, 1974 before Judge Frankel and a jury and concluded on March 16, 1974. At the end of the Government's case the Court granted defendant's motion for acquittal with respect to twenty-one counts (141a, 148a). After all the evidence was in, twenty-three counts were submitted to the jury. The jury deliberated over a three-day period, requesting a re-reading of the entire charge as well as portions of the evidence. After substantial deliberation, the jury acquitted defendant of certain counts and reported an irreconcilable split as to the remainder. They were instructed to continue their deliberations. After further consideration, the jury acquitted defendant of additional counts (twenty in all) and convicted him of the one misdemeanor count involving the alleged failure to maintain records and the two "aiding and abetting" felony counts involving the leased automobile (Counts 10, 28 and 29 of the original indictment; Counts 1, 17 and 18 of the

redacted indictment submitted to the jury).[2] (452a-460a).

On April 29, 1974 Judge Frankel denied a motion to set aside the verdict, and on May 1, 1974 he imposed sentence of three months imprisonment on Count 10, the "failure to maintain records" misdemeanor, and a fine of $5,000.00 on each of the three counts, a total of $15,000.00 (16a-17a). By the terms of Section 504 of the LMRDA (29 U.S.C. §504), a conviction on each of these counts is also a "barrable offense," precluding defendant from serving as a union officer for a period of five years.[3] Defendant is now 66 years of age (152a).

Statement of Facts

During the period covered by the indictment, mid-1968 to mid-1972, defendant was the President of Local 144, Service Employees International Union, AFL-CIO, a labor organization representing hotel, hospital and nursing home employees in the metropolitan New York City area. Defendant began working as an elevator operator in the hotel industry as a 19-year old immigrant from Granada, British West Indies; he helped to organize the hotel, became an elected shop steward, and has served as a union officer since 1940. He was first elected President in about 1955 (110a; 152a-157a).

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2. Because of the dismissal of a number of counts and the use of a redacted indictment, the individual counts are referred to in the trial transcript either by their original number or their new number under the redacted indictment, depending upon the stage of the trial. In this brief we will use the original count numbers.

3. In addition to the penalties imposed by law, a felony conviction results in the loss of defendants' pension benefits under the pension plan established by the union. These benefits, upon retirement, amount to approximately $15,000.00 per year for life (301a; transcript of Ottley sentencing, May 1, 1974, pp. 15-16).

All witnesses knowledgeable in the affairs of Local 144, Government as well as defense, friend and foe alike, testified that it was largely due to defendant's commitment and dedication that the Local grew from a small union to an organization with a membership of over 25,000 (e.g. 65a-67a; 149a-151a; 161a).

A. The "Automobile" Counts

The growth of Local 144 was accompanied by an expansion of the territory in which its members worked and a dramatic increase in the number of institutions and establishments with which the union had collective agreements and which its officers and business agents were required to service (161a-162a).

In order to enable its officials to meet the needs of approximately 25,000 members working in a large number of locations throughout the metropolitan area, Local 144 supplied them with automobiles and paid for the gasoline consumed by these automobiles (207a; 298a-299a). The two embezzlement counts of which defendant was convicted relate to an automobile leased by the Union for its Secretary-Treasurer, Peter Byrne.

(1) Byrne's Testimony

Byrne had served as Secretary-Treasurer of Local 144 since 1958. Previously he had been a business agent, division director and executive vice-president of the Local and an officer of a predecessor local union that had merged into it (111a, 113a).

Byrne was indicted with Ottley as a co-defendant. Under the two automobile counts he was charged as principal and Ottley as aider and abettor. In January, 1974, Byrne pleaded

guilty to a single misdemeanor count which would not serve to bar him from union office. On February 22, 1974 at his sentencing, Judge Frankel initially indicated a disposition to impose a fine of $5,000. After hearing not only Byrne and his attorney but also the Assistant United States Attorney speak on Byrne's behalf, the Court imposed a fine of $500. The two "automobile leasing" embezzlement counts were dismissed as against Byrne, the principal, leaving Ottley, the alleged aider and abettor, to be tried alone (117a-122a; 129a-130a; transcript of Byrne sentencing on February 22, 1974).

At trial, Byrne testified about the number of cars leased for union business agents and officers and the purpose of making these cars available, as follows (123a):

Q. Now, do you know how many cars the union leases?

A. The last time that I had an accounting on them I believe it was 12.

Q. Do you know how many were specifically authorized?

A. I never recall any car being authorized except Mr. Ottley's car.

Q. What were all of these cars used for?

A. They were used for the convenience of the business agents and the organizers.

Q. Were they used for union business?

A. Yes.

Q. Did you have one of these cars?

A. Yes.

Unlike the secretary-treasurers of some unions, Byrne's duties were not confined to the office. As with the other Local 144 officials for whom automobiles were leased, his responsibilities included the servicing of establishments under union contract,

the supervision and administration of the collective agreements at these institutions, and the attendance at meetings and hearings outside his office (101a-102a; 296a).

Byrne testified that the Local first supplied a car to him in 1962, that for a period in the mid-1960's no car was provided, and that during the indictment period, 1968-1972, another car was leased for him. He testified that Ottley authorized the leasing of all the automobiles used by union officials and that he did not recall any Executive Board or membership authorization either for the car used by him or those used by the business agents. Ottley, he said, also authorized his use of a Texaco credit card and signed the auto leasing contract and the rental payment (94a-95a; 98a-99a, 103a).

Byrne testified further that he did not and could not drive an automobile because of eye problems. During the period 1969-1971 he had three eye operations and these were known to Ottley (99a-100a).

During the period in question Byrne lived in Harrington Park, New Jersey. His wife also worked in New York. He testified that she drove him into New York City each working morning, dropped him off at a convenient subway station, and continued driving to her own place of business. The car remained parked near her office (not at union expense) and at the end of the day the process was reversed. Byrne's wife picked him up at the Manhattan subway station and drove him home to New Jersey (100a-101a).

The gas receipts on the Texaco credit card, some of which defendant saw, were signed by Mrs. Byrne. All, or virtually all, were at a gas station near the Byrne home in New Jersey. No

gas receipts emanated from a location inconsistent with use of the car for business purposes (102a; Exh. 36).

(2) Defendant's Testimony

Defendant testified that Local 144 leases automobiles for its officers and business agents to enable them to service the union's members. He testified that there was a general Executive Board authorization for this practice in the 1950's but he recalled no specific authorization for the leasing of a car for Byrne. He testified Byrne requested a car to take care of union business. He denied knowledge as to whether or not Byrne had a driver's license or whether Byrne drove a car himself. He did not inquire whether Byrne intended to drive himself or have somebody else act as his chauffeur or driver. He simply assumed the car was being used for the purpose for which it was provided (207a-208a; 295a-301a).

(3) Byrne's Rebuttal Testimony

On rebuttal Byrne testified that he told defendant in 1962, when the union was first about to provide a car for him, that he had no driver's license. Ottley, he said, told him to get a license and he responded that he could not because of a bad eye (381a-384a). When asked on cross whether Ottley knew the use he was making of the car and for his own views as to the propriety of that use, his testimony was as follows (385a):

> Q. I see. Mr. Byrne, at the time you first received a union car did you tell Mr. Ottley that you were not going to use the car for union business?
>
> A. No; I did not.
>
> Q. Did you use the car for union business?

A. Well, as far as my transportation, part of the way to and from my job, I would say yes.

Q. You were satisfied that you were using the car for union business?

A. You might call it that.

The record is barren of any evidence that Ottley was ever told that Byrne was not using the car for union purposes or that he was ever aware how the car was in fact being used. Nor is there evidence that Ottley knew that Mrs. Byrne had a job or was unavailable to drive her husband during the business day or that Byrne did not utilize someone else to act as his driver.

B. The "Failure to Maintain Records" Count

The factual evidence on this count was not in dispute. Sharply at issue is whether the defendant's conduct constitutes a crime and the sufficiency of the evidence as to his knowledge, intent and willfulness. Also, as we shall show below, the charge on the question of knowledge and willfulness was prejudicially erroneous, and serious error was committed in the admission and exclusion of evidence.

Section 201(b) of the LMRDA requires every labor organization to file an annual financial report, signed by its president and treasurer, with the Secretary of Labor. Among the matters required to be reported are the indirect disbursements, including reimbursed expenses, to each officer. Similar reporting requirements are imposed on employers and labor relations consultants.

Section 206 provides that every "person required to file any report under this title shall maintain records on the matters required to be reported which will provide in sufficient

detail the necessary basic information and data from which the documents filed with the Secretary may be verified, explained or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts and applicable resolutions ...."

Defendant and Byrne, the two principal officers of Local 144, were entitled to reimbursed expenses. The Local had a "petty cash voucher" form; and each week defendant submitted a signed voucher form showing the amount expended by him that week and the description "reimbursed expenses." When he was out-of-town on union business, he telephoned the amount of reimbursed expenses to the office manager. Occasionally, when he was out-of-town and unavailable, she estimated his expenses on the basis of usual patterns and submitted a voucher on his behalf. There is no concrete evidence, however, that such incidents occurred during the period covered by the indictment (70a-77a; 165a-169a; 237a-239a; 245a-246a).

The reimbursed expenses were regularly approved by the union's Executive Board (173a-174a). There is no charge that the sums received were improper, that defendant did not in fact spend the amount claimed on union business, or that they did not represent the kinds of charges usually characterized by the phrase "reimbursed expenses."

Defendant testified that he was not aware of any legal requirement that he submit more detailed vouchers or underlying bills. He thought the voucher statement which he signed and submitted constituted a sufficient record (354a-356a).

In an effort to show that Ottley was not only required to submit more detailed records but was aware of such a require-

ment, the Government introduced the following evidence:

(1) In 1959, after Congressional adoption of the LMRDA, the Service Employees International Union held a meeting in Chicago, one purpose of which was to hear the union's attorneys discuss the new statute (56a-58a; 367a-370a). However, there was no evidence that Ottley was present during any session at which the LMRDA was considered (57a). Moreover, there was no evidence that the "maintaining of records" provision of the Act (Section 206) was even discussed at this meeting. One of the attorneys who addressed the Chicago conference testified that he could not recall if the record-keeping section was dealt with (369a); and given the vastly greater publicity accorded other portions of the Act -- elections, trusteeships, bonding, reporting, members' bill of rights -- there is no reason to assume that this clause was even mentioned.

(2) Over objection, evidence was introduced that the International Union, in 1959, sent literature to its locals on the newly-enacted LMRDA (20a-23a). However, there is no evidence that defendant ever received or saw this literature, for copies of most of the materials were not sent to individual officers. Moreover, the literature, which was introduced in evidence, consists simply of the text of the entire LMRDA and union comments on other portions of the statute which do not even mention the record-keeping requirement. In view of the length, variety and complexity of the statute, there is no evidence that defendant, if he saw the literature at all, became aware of the existence or meaning of Section 206 (25a-34a; Exh. 47, 47-A through 47-D).

(3) Over objection, evidence was also introduced that the International's attorneys addressed the Executive Board on

legal developments under the LMRDA (23a-24a; 35a-36a; 370a-374a). Ottley became a member of the Executive Board in 1964 (42a-43a). However, the International's general counsel, who appeared as a Government witness on rebuttal, testified that the reports to the Executive Board simply involved significant recent decisions (372a; 376a-379a); and in view of the paucity of reported cases under Section 206 (this may well be the first reported case based on a failure to maintain records as distinguished from making false entries in records required to be maintained), there is no basis for assuming that any attorney's report within Ottley's hearing dealt with the record-keeping requirement.

(4) The LM-1 form filed by Local 144 in December, 1959 contains a printed statement setting forth the record-maintaining requirement of Section 206 of the Act (Exh. 1). Defendant was one of the union officers who signed that form. This statement, unlike other printed portions of the form dealing with statutory requirements, is neither bold-faced nor otherwise emphasized. Defendant testified that he never read that portion of the form, and there is no evidence that it was ever called to his attention (220a-224a). The LM-2 forms which are signed and filed annually contain no such statement and no reiteration of the requirements of Section 206 of the Act.

C. The Judge's Charge to the Jury

(1) The "Automobile" Counts

In colloquy with counsel on their requests to charge, Judge Frankel stated his belief that the key question in an embezzlement case under the LMRDA was authorization. Absent

authorization, he said, unless the expenditure lacks any element of personal benefit, then the crime is established. Thus for the large group of typical business expenditures that also have some element of personal benefit or convenience -- entertainment, meals, automobile expenses, taxis, etc. -- the existence of demonstrable union benefit does not save an unauthorized expense from criminal condemnation. More important, Judge Frankel indicated that a good faith belief on the part of the union officer that the expense is for union benefit will not relieve him of criminal culpability, although a good faith belief in the existence of authorization is a valid defense (390a-396a).

Judge Frankel candidly admitted that he was not sure he was correct on this issue and that he had found no persuasive authority in point (391a-392a).

Both in their requests to charge (see Deft. Request No. 8, Paragraph 3, incorporated by reference in Request No. 9) and in colloquy with the Court before and after delivery of the charge, defense counsel made known their objections to this definition of embezzlement, particularly as it virtually excluded the concept of union benefit and the defendant's good faith belief that the expenditure was being made for union purposes (395a, 450a, 451a).

The actual charge to the jury conformed to the Court's prior comments to counsel. The Court charged:

> "I want to take a sentence or two to spell that out. Sometimes the question seems perfectly clear. The payment of rent on a union office would seem to be quite clearly for union purposes. The purchase by union officers of clothing or luggage or other very personal things for himself or herself and for his or her spouse would seem to be clearly for a personal and non-union purpose. But many items could be one or the other, personal or union purpose, depending on the nature of the authorization and understanding with which the items were bought or paid for.

"So, for example -- and an example that is involved in this case -- an expenditure for a pension of a union officer or expenditures for entertainment expenses may be and in some measure are for the personal benefit of the officer or others and at the same time may serve union purposes and supply union benefits. In such cases, which may be a majority of the cases that you will be concerned with, it becomes a key question whether the particular expenditure was properly authorized. That becomes a key question in determining whether the expenditure was a diversion without authority for personal purposes or a proper expenditure with authority, that because of that authority may be deemed to have been for union purposes or for valid union ends.

"In the circumstances of this case and in the circumstances of all the charges of embezzlement, you will have to consider a central question of these two matters, first, whether the particular expenditure you are considering was in fact duly authorized by the union under its prescribed procedures; second, whether, even if the expenditure was not authorized, the defendant believed in good faith that he had authority to make that expenditure.

"What the defendant believed is part, and an important part, of the knowledge and wilfulness to which I have referred already and to which I will be making additional references as this goes along.

"As I have said, under all the counts charging embezzlement, the defendant must be shown to have acted knowingly and wilfully before he may be convicted. He may not be convicted, therefore, if he made a particular expenditure in the good-faith belief that it was authorized, even though it may not have been authorized. He may not be convicted if he made a particular expenditure for himself for purely personal benefit but did that by oversight or accident, having no intention permanently to divert the union's moneys and having the intention then and there to reimburse the union for the particular expenditure (421a-422a).

* * *

"Once again, the basic problem for you will be whether Mr. Ottley, with respect to any or all three of these expenditures, knowingly and wilfully embezzled the moneys by spending them for these hotel purposes without authority and without a good-faith belief that there was such authority.

"As I say, the question of authorization is important once more, although it is not the only question you must decide. You must decide, again, first of all, whether the Government has sustained its burden of proving that there was not authority for these expenditures. If you find that there was authority, that is the end of the matter, and you must acquit. If there was not authority, once more you reckon with the question of knowledge and wilfulness.

"You must decide whether Mr. Ottley believed in good faith that he was authorized to spend such sums for such purposes. To convict, you must be convinced beyond a reasonable doubt that Mr. Ottley did not act with such a good-faith belief but acted with knowledge that the expenditures were not authorized, so that the sums were actually being used in violation of the law against embezzling or stealing welfare and pension trust funds (435a-436a)."

The trial judge's charge virtually read the concept of union benefit out of the case. Indeed, the charge did not even permit the jury to consider the defendant's good faith belief that an expenditure was for a union benefit and that this was the reason he caused it to be made.

(2) The "Failure to Maintain Records" Count

The Court charged that the term "willful" under the "failure to maintain records" count had a different meaning than under all the other counts submitted to the jury. "Willful," he said, normally means knowingly, deliberately, and "with the specific intent to do something the law forbids, that is, with an evil or bad purpose" (415a, 437a).

Under the record-keeping count alone, he charged, willful meant something less. "Knowing and wilful behavior" under that count, the judge defined as follows (415a-416a):

"In general, we contrast knowing and wilful behavior with conduct that occurs as a result of inadvertence or accident or mere negligence. In the specific circumstances of this case and with specific reference to Count 1, repeating that the definition differs somewhat in connection with the other counts, you are instructed that knowledge and wilfulness may be established if the proof satisfies you of either one of two things: either that the defendant knew what the law required and that he was failing to comply or that he acted in reckless disregard -- the phrase you have heard from both attorneys -- of what the law required of him in his position of trust as a local union president.

"Knowledge and wilfulness may not be established if the failure to maintain the required records resulted from mere negligence or oversight, especially if the defendant had made

reasonable efforts to know his fiduciary obligations as a union officer.

"On the other hand, the president of a labor organization is not free to close his eyes to the legal requirements governing his responsibilities or to choose deliberately to be indifferent to his legal obligations. It is such closing of the eyes or deliberate indifference or refusal to be informed that we have in mind when all of us here speak of reckless disregard of legal obligations.

"Now, you will follow the principles I have just stated and have in mind that the Government must prove either actual knowledge or reckless disregard, as I have spelled these terms out, in order to make out the essential element of knowledge and wilfulness under Count 1 of the indictment."[4]

ARGUMENT

Our argument is divided into two parts. Part 1 concerns the two "automobile" counts; Part 2 concerns the "failure to maintain records" count.

PART 1. THE "AUTOMOBILE" COUNTS

I. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE VERDICT, AND THE "AUTOMOBILE" COUNTS SHOULD NEVER HAVE BEEN SUBMITTED TO THE JURY.

Inasmuch as defendant was convicted as an "aider and abettor" of Byrne, the sufficiency of the evidence of embezzlement must be scrutinized from the standpoint of both men. For it is well-settled that a defendant may not be convicted as an aider and abettor unless the principal has committed the substantive crime. Shuttlesworth v. City of Birmingham, 373 U.S. 262, 265 (1963); United States v. Martinez, 479 F.2d 824, 829 (1st Cir.

4. Both through their own requests to charge and in colloquy with the Court, defense counsel indicated their objections to this portion of the charge (Deft. Requests Nos. 6 and 14; 386a-389a; 399a).

(1973); United States v. Jones, 425 F.2d 1048, 1056 (9th Cir. 1970), cert. den'd, 400 U.S. 823; Hendrix v. United States 327 F.2d 971, 975 (5th Cir. 1964); United States v. Titus, 210 F.2d 210, 214-215 (2d Cir. 1954); Karrell v. United States, 181 F.2d 981, 985 (9th Cir. 1950), cert. den'd, 340 U.S. 891.

It is equally well-established that even if the principal is guilty, "aiding or abetting" requires knowing, intentional and willful participation in the criminal endeavor. Nye & Nissen v. United States, 336 U.S. 613, 619-620 (1949); United States v. Ehrenberg, 354 F. Supp. 460 (E.D. Pa. 1973), aff'd 485 F.2d 682 (3d Cir. 1973); United States v. Austin, 462 F.2d 724, 732 (10th Cir. 1972), cert. den'd 409 U.S. 1048; White v. United States, 366 F.2d 474 (10th Cir. 1966). I United States v. Docherty, 468 F.2d 989, 992 (2d Cir. 1972), this Court held that to find a defendant guilty of aiding and abetting an embezzler, there must be "enough evidence that he knew of such activity of the principal and desired to forward it."

The scope and meaning of Section 501(c) of the LMRDA was thoroughly considered in United States v. Silverman, 430 F.2d 106, 126-127 (2d Cir. 1970), cert. den'd, 402 U.S. 953. The Court held:

> "When Congress in 1959 subjected to criminal sanctions 'any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another' any of the assets of a labor organization of which he is an officer or employee, it was not inventing new language. The phraseology resembles that used in defining many 'larceny-type' offenses in the criminal code. See, e.g., 18 U.S.C. §641 (public money, property or records), §645 (court officers), §654 (officer or employee of United States embezzling or converting money or property of another), §655 (theft by bank examiner), §656 (theft, embezzlement, or misapplication by bank officer or employee), §657 (employees of various lending, credit and insurance institutions, §658 (property mortgaged or pledged to farm credit agencies), §659 (interstate or foreign shipments by carrier), §660

(carrier's funds derived from interstate commerce), §661 (personal property within maritime and territorial jurisdiction); 15 U.S.C. §80a-36 (assets of registered investment companies). These statutes have gone beyond the common law offense of larceny and the old statutory crime of embezzlement because 'gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches,' Morissette v. United States, 342 U.S. 246, 271-72 (1952). But, as was there held, despite minor variations in language the common thread is that the defendant, at some stage of the game, has taken another person's property or caused it to be taken, knowing that the other person would not have wanted that to be done. See Brown v. Bullock, 294 F.2d 415, 418-20 (2 Cir. 1961). Congress subjected union officers or employees to the same test of criminal liability as government employees, bank officers and the like -- not to a lower one. See Colella v. United States, 360 F.2d 792, 798 n. 4 (1 Cir.), cert. denied, 385 U.S. 829 (1966), and the legislative history there cited."

In United States v. Ferrara, 451 F.2d 91, 95 (2d Cir. 1971), cert. den'd 405 U.S. 1032, the Court cautioned, with regard to Section 501:

"This is a criminal statute we are construing, and we have been admonished not to 'enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute.' Morissette v. United States, 342 U.S. 246, 263 (1952)."

With these principles in mind, we now consider the evidence as to each man.

Byrne

There is no question that Byrne knew how the automobile leased for him was being used. Each day he was driven by his wife from their home in New Jersey into Manhattan, where the union office was located, and dropped off. Generally, the process was reversed in the evening.

There is no evidence that the automobile was used for any other purpose. There is no evidence that the Byrnes used it for pleasure trips or personal family travel. There is no

evidence that the gasoline charges represented anything other than the daily round trips between New Jersey and New York.

The evidence as to Byrne's intent and state of mind comes from his own testimony, and it stands uncontradicted. Although a Government witness who stood to achieve a long-cherished ambition upon defendant's conviction and removal from union office (125a-126a) -- and who was hostile to defendant for other reasons as well (50a) -- Byrne testified that he regarded the use of the car to transport him between New Jersey and New York as a union purpose; and, in his view, therefore, the car was indeed being used for union purposes (385a).

Although Byrne's testimony as to his own state of mind need not be accepted by the jury, there is no contrary evidence from which the requisite criminal intent and evil purpose could be inferred. The mere fact that his wife drove the car and that it was used only to drive him back and forth between his home in one state and the borough in New York in which his office was located does not of itself give rise to such an inference. Rather it supports his own direct testimony of lack of willfulness and criminal intent. To permit a jury to rest a conviction in which Byrne's own willful intent to embezzle is directly at issue upon this meager evidence is to permit a verdict founded on speculation and assumption, not fact.

Ottley

If the evidence is meager and tenuous as to Byrne, it is doubly so as to defendant. For while Byrne had factual knowledge of the way the car was used, there is no evidence to support a finding that defendant shared his knowledge. And absent such

knowledge on defendant's part, a material element of embezzlement under the decisions of this Court is lacking.

Whether Ottley knew the actual use made of the Byrne car was the principal factual issue litigated at trial under the two "automobile" counts. Viewing the evidence most favorably to the prosecution, the most that can be said is that defendant knew Byrne was unable to obtain a driver's license due to his eye problem.[5] From this the jury might infer that defendant also knew Byrne did not drive the car himself. The fact that the gas receipts were signed by Mrs. Byrne adds nothing, for if Byrne could not drive, then obviously someone else had to be obtaining fuel for the car.

It by no means follows, however, that a jury in a criminal case is entitled to conclude beyond a reasonable doubt that defendant knew from Byrne's own inability to drive that the car was not being put to Byrne's use for the intended union purposes. Byrne himself flatly testified that he did not tell Ottley that he was not using the car for union purposes (385a). Nor is there evidence that Ottley ever acquired knowledge from any other source as to how the car was being used.

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5. This evidence was adduced on rebuttal only and not during the Government's case in chief. Under the rule first adopted by the District of Columbia Circuit and thereafter by other Circuits, evidence introduced after the prosecution has rested may not be considered in passing upon the sufficiency of the evidence, where, as here, the defendant has moved for acquittal at that point. Cephus v. United States, 324 F.2d 893, 895-7 (D. of C. Cir. 1963); United States v. Rizzo, 416 F.2d 734, 736 (7th Cir. 1969); United States v. McIntyre, 467 F.2d 274, 276 (8th Cir. 1972); Comment, "The Motion for Acquittal: A Neglected Safeguard," 70 Yale Law Journal 1151 (1961). For the reasons set forth in these authorities, which need not be elaborated here, we urge the Court to adopt that rule.

This union of over 25,000 members had a large number of officials; twelve automobiles were leased for business agents and officers, while four other privately owned cars were used by other officials who were reimbursed for their auto expenses (103a-104a, 123a). There is no basis for concluding that Ottley, who was the principal officer of the entire union, kept track of the comings and goings of any particular official or knew which auto was used by which official.

The fact that a man cannot drive an auto himself does not mean that he cannot have the use and benefit of that car for whatever purpose he desires. Thousands of non-drivers are regularly transported about, either by relatives, friends or chauffeurs, paid or unpaid.

It may be that Ottley, busy though he was, should have inquired of Byrne how he was using the car, but Byrne testified that Ottley made no such inquiry and that Byrne himself never volunteered the information. Whether this represented oversight or even negligence on defendant's part, it does not substitute for the requisite knowledge and is grossly insufficient under the standards of "knowing and willful" conduct applicable to the felony of embezzlement. Morissette v. United States, 342 U.S. 246 (1952).

It is possible that defendant did conclude from Byrne's inability to drive that the leased automobile was not being used for the contemplated union purposes. It is at least as possible that he drew no such conclusion. But a defendant may not be convicted of embezzlement under the LMRDA on the basis of "possibilities." United States v. Lynch, 366 F.2d 829 (3d Cir. 1966). The evidence must justify reasonable men in concluding

defendant to be guilty beyond a reasonable doubt; if it does not, submission to the jury is error. United States v. Taylor, 464 F. 2d 240 (2d Cir. 1972). Here the inferences are far too tenuous and speculative, and the trial judge erred in failing to grant defendant's motion for acquittal.

II. THE COURT'S CHARGE, IN FAILING TO PERMIT THE JURY TO CONSIDER WHETHER THE AUTOMOBILE EXPENDITURES WERE FOR A UNION BENEFIT, OR WHETHER THE DEFENDANT OR BYRNE IN GOOD FAITH BELIEVED THEM TO BE FOR UNION PURPOSES, CONSTITUTED REVERSIBLE ERROR.

Section 501(c) defines the crime in terms of embezzlement, theft, or unlawfully and willfully abstracting or converting the assets of a labor organization "to his own use, or the use of another." Central to all these terms is the concept of "taking" the property of another (United States v. DeNormand, 149 F.2d 622 (2d Cir. 1945), cert. den'd, 326 U.S. 756), depriving the owner of its use and benefit, and doing so with criminal intent, that is, evil purpose or motive. One who in good faith believes that he is expending monies for the benefit of the owner -- in the case of §501(c) the labor organization -- cannot be guilty of embezzlement. United States v. Silverman, supra, 430 F.2d 106; Colella v. United States, 368 F.2d 792 (1st Cir. 1966), cert. den'd, 385 U.S. 829; cf. Morissette v. United States, supra, 342 U.S. 246.

The judge's charge on the automobile counts pointedly departed from these principles and sharply limited the issues presented to the jury for decision. Indeed, under his charge, the bulk of the evidence adduced by both Government and defense under the automobile counts was rendered irrelevant.

The extent to which this charge withdrew legitimate factual issues from jury consideration is apparent from a review of the issues arising out of the evidence and the posture of the record at the time the case went to the jury.

Essentially the following factual issues emerged from the evidence on the two automobile counts: (1) did Local 144 authorize the leasing of the auto used by Byrne; (2) was the use of the auto to bring Byrne between his home in New Jersey and the Manhattan destination a "union purpose"; (3) if this was not a union purpose, did Ottley have knowledge of how the car was in fact being used; and (4) did either Byrne, as principal, or Ottley, as alleged aider and abettor, believe that the car was being used for the union's benefit. Issues (3) and (4), although related, are in fact separate and distinct.

The judge's charge, quoted above at pages 14-16, in effect withdrew all but the first issue from the jury. For it is clear that the use of an automobile is a prime example of the kind of "mixed" expenditure that, no matter how beneficial to the union, has elements of personal convenience and benefit as well.

This being so, under the charge, the issue of authorization became all-important and the issue of union benefit virtually non-existent. The judge instructed the jury that only a pure, unalloyed "union benefit" expenditure, with no element of personal benefit, could bring into play a jury issue of "union benefit" if the expenditure was not authorized. As the Court also recognized, however, this case does not involve that type of rare, "pure" union benefit expenditure (420a-422a).

Ottley testified that a union authorization in the 1950's approved the general practice of leasing cars for union

officials (297a-299a). Nevertheless, the jury, having before it Byrne's denial of recollection of any such authorization, was free to reject Ottley's testimony and conclude that no authorization had been given. Once the jury reached this conclusion, then under the charge given, it was bound to convict. And this would be so even if the jury also believed that (1) the auto was in fact being used for union purposes, (2) Byrne, the alleged principal, actually believed in good faith, as he testified, that the car was used for union purposes, or (3) Ottley, the alleged aider and abettor, had not the slightest knowledge of Byrne's inability to drive and believed throughout that Byrne was himself using the car regularly and continuously on union business.

It is critical to bear in mind that while Byrne testified that he told Ottley of his inability to drive, Ottley testified to the contrary (296a-297a; 301a). As a factual matter, the jury was free to accept Ottley's testimony on this score and to conclude that he lacked any knowledge of how the car was being used and assumed in good faith that it was being driven by Byrne himself on union business.

Nevertheless, under the Court's charge, this would have been irrelevant, the elements of embezzlement would have been established, and defendant would have to be convicted. For once the authorization issues were resolved against defendant, then no issue of union benefit or good faith belief in union benefit could be considered. And by twice advising the jury that good faith belief in authorization negated criminal intent, the Court only emphasized the lesson that good faith belief that the car was being used for union purposes did not.

The extent to which the judge's charge went beyond even

the prosecution's theory of the case can be illustrated by reference to the other eleven cars leased by Local 144. Although these, like the Byrne car, were openly leased and fully reflected in the union's books and records, defendant was not indicted for having caused them to be provided to the union's business agents, although Byrne testified that these cars too were unauthorized. Obviously, the reason is that the Government implicitly acknowledged that these autos were in fact being used for union purposes. Yet under the jury charge in this case, Ottley could just as readily have been convicted for causing those autos to have been made available without authorization, or good faith belief in authorization, as he was for the car leased for Byrne.

In the posture of the evidence developed by both sides on the two automobile counts, the effect of the judge's charge was devastatingly prejudicial. It withdrew the principal litigated factual issue from the jury and left defendant only the narrow issue of authorization -- the subject of but a few sentences of testimony -- on which to seek acquittal. As appears plainly from the colloquy between court and counsel prior to the charge, the instructions given on this point were not inadvertent but precisely what the judge intended to convey (390a-396a).

The magnitude of the error appears clearly from an examination of the principles laid down in Silverman, supra. There this Court observed that the phraseology in Section 501(c) resembles that used in many of the "larceny-type" sections found in Chapter 31 of Title 18. The Court concluded that Congress intended to subject union officials to the "same test of criminal liability" as persons subject to these cognate statutes -- "not to a lower one." This holding conforms to the rule of construction

expressed by the Supreme Court in Morissette v. United States, supra, 342 U.S. 246, 263, which itself arose under one of the related federal "larceny-type" statutes.

> "And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed."

Since LMRDA Section 501(c) must be construed in light of the principles developed under the older, similarly phrased statutes, we turn now to an analysis of these principles, as applicable to the judge's charge herein.

From the enactment of the first of these federal "larceny-type" statutes to date, it has been established that an essential element of the crime is an intent to injure or defraud the owner of the property. Until the last quarter-century, this was by express statutory language. In the 1948 Revision of the Criminal Code the words were removed, but the cases have consistently held that the substance remains unchanged and that intent to injure or defraud the property-owner remains a critical element of the crime. Title 18, Section 641: United States v. Barlow, 470 F.2d 1245, 1251 (D.C. Cir. 1972); Allsworth v. United States, 448 F.2d 439, 442 (9th Cir. 1971); United States v. Powell, 294 F. Supp. 1353, 1355 (E.D. Va. 1968), aff'd 413 F.2d 1037 (4th Cir. 1969). Section 656: United States v. Schmidt, 471 F.2d 385, 386 (3d Cir. 1972); United States v. Docherty, supra, 468 F.2d 989; United States v. Fortunato, 402 F.2d 79, 80 (2d Cir. 1968), cert. den'd, 394 U.S. 933; Williamson v. United States, 332 F.2d 123, 134 (5th Cir. 1964). Section 657: United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971). Section 659: United States v. Padilla,

374 F.2d 782, 784 (2d Cir. 1967).

An intent to injure or defraud the owner -- or, as it is sometimes put, an intent to convert the owner's property to the use of defendant or another (see Padilla, Powell, Allsworth, supra) -- is fundamentally inconsistent with an intent to use the property for the owner's benefit and a good faith belief that the property is in fact being used to serve the owner's purposes. Thus the trial court's view that union benefit, or good faith belief in union benefit, is irrelevant under LMRDA Section 501(c) in the absence of authorization simply cannot be reconciled with the consistent construction given these related federal statutes embodying the same elements of criminality.

A closer focus on key cases under the federal "larceny-type" statutes makes the point even more evident. In the early leading case of United States v. Britton, 107 U.S. 655 (1883), a bank president was charged under the predecessor statute to 18 U.S.C. §656 with misapplying the moneys of the bank for unauthorized purchases of stock. The stock thus acquired was held in trust for the bank. In dismissing this count as legally insufficient, the Supreme Court held (pp. 666-667, 668):

> "We think the willful misapplication made an offense by this statute means, a misapplication for the use, benefit or gain of the party charged, or of some company or person other than the association. Therefore, to constitute the offense of willful misapplication, there must be a conversion to his own use or the use of some one else, of the moneys and funds of the association by the party charged. This essential element of the offense is not averred in the counts under consideration, but is negatived by the averment that the shares purchased by the defendant were held by him in trust for the use of the association, and there is no averment of a conversion by the defendant to his own use or the use of any other person, of the funds used in the purchase of the shares. The counts, therefore, charge maladministration of the affairs of the bank, rather than criminal misapplication of the funds.

* * *

"We are, therefore, of opinion that the willful misapplication of the moneys and funds of the banking association, which is made an offense by section 5209, means something different from the acts of official maladministration referred to in section 5239, and it must be a willful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association, or some other body corporate, or some natural person."

In other words, the mere fact that Britton acted in an unauthorized manner with the funds of the bank might constitute maladministration; but lacking a conversion of the funds to the use of another or an intent to so convert them, there is no crime under the federal statute. Adapting that holding to the present case, the mere fact that Ottley may have leased the Byrne automobile without authorization may constitute a civil violation of Section 501(a); but if he intended that the car be used for union purposes and believed that it was being so used, then there is no intent to convert and no crime under Section 501(c). It is this requested charge that the judge refused, and precisely the opposite that he charged.

In United States v. Fish, 24 Fed. 585, 588, 590 (2d Cir. 1885), also an embezzlement case involving a bank president, this Court held as follows:

"The proper conclusion to be drawn from the Britton Cases, taken together, seems to be this, viz.: that the honest exercise of official discretion in good faith, without fraud, for the advantage, or supposed advantage of the association is not punishable; but if official action be taken, not in the honest exercise of discretion, in bad faith, for personal advantage, and with fraudulent intent, it is punishable.

* * *

"A known abuse of discretionary power in making a series of loans which it is known the directors would not sanction, will constitute a criminal misapplication, if found to have been done in bad faith, for private gain, and not in the exercise of honest judgment."

If abuse of power through the making of loans known to be unauthorized is criminal only "if found to have been done in bad faith, for private gain, and not in the exercise of honest judgment," then making of unauthorized loans or expenditures is not criminal if done in the good faith belief that it is for the benefit of the owner and in the exercise of honest, if misguided, judgment. Again, this is the substance of the charge Ottley requested and the judge rejected; it is the contrary of what was actually charged.

In United States v. Musgrave, supra, 444 F.2d 755, 764, a prosecution under 18 U.S.C. §657, the Court held that defendant was entitled to an undiluted charge that exculpatory good faith meant loans (the type of transaction there at issue) made for the benefit of the owner. The Court stated that whether the defendant also intended to profit from the transaction was irrelevant. Again, this represents a construction of a related statute utterly inconsistent with the rejection below of the relevancy of "owner benefit" or good faith belief in owner benefit.

In Weinhandler v. United States, 20 F.2d 359 (2d Cir. 1927), cert. den'd, 275 U.S. 554, defendant was charged with selling United States Army blankets and depositing the proceeds to his own account. In discussing the elements of the crime of embezzlement of government property, this Court said (pp. 361, 362):

> "Embezzlement is established by proof that the property came lawfully into a defendant's possession under circumstances which create a fiduciary relation between a defendant and its owner, and that there was a breach of trust or a wrongful appropriation of the property to the defendant's use."
>
> * * *
>
> "If the blankets belonged to the United States and were sold, the proceeds belonged to the government, whether or not the sale was authorized."

It is plain from this that if Weinhandler had made unauthorized sales of Government property but had retained the proceeds for the benefit of the Government, there would have been no crime. Again, notwithstanding unauthorized transactions, the intent to convert property to the use of the defendant and to deprive the owner of its benefit was deemed critical.

In the recent case of United States v. Docherty, supra, 468 F.2d 989, this Court reversed an embezzlement conviction under 18 U.S.C. §656. The Court held that even though defendant knew bank funds were being put into the hands of another in violation of the bank's rules, there was insufficient evidence of the required intent to injure or defraud the bank. In other words, knowing lack of authorization for the transaction was insufficient, absent proof that defendant's intent was to injure or defraud.

In the instant case, Ottley denied knowing of Byrne's inability to drive and testified that he intended that the Byrne car be used for union purposes and believed that it was being used for those purposes. The jury had a right to accept that testimony, but the judge's charge deprived it of significance. Applying the principles laid down in the cases under federal larceny-type statutes, defendant was at least entitled to a charge that if the jury accepted this testimony and found his good faith intent to be as he testified, then they should acquit.

To say that good faith belief that an expenditure serves a union purpose and is being made to further union ends negates criminal culpability is not to say that union officers may, with impunity, make unauthorized expenditures of union moneys. Unauthorized expenditures undoubtedly breach the fiduciary obligations imposed on union officers under Section 501(a) of the LMRDA.

And such breaches expose the offending officer to a wide variety of civil consequences under the provisions of the Act: injunctive relief, a damage suit, an accounting for moneys spent, even removal from office. See, e.g. LMRDA Sections 501(b), 401(h). Suit to enforce the array of civil remedies may be brought either by the Secretary of Labor or by union members themselves. But whatever the civil liabilities, misguided, well-intentioned, unauthorized expenditures conceived to be for union purposes do not constitute criminal, felonious embezzlement.

The way in which Congress defined the crime under Section 501(c) provides further confirmation of this. After spelling out the fiduciary obligations in Section 501(a), including the requirement that expenditures be authorized, Congress did not proceed to say "Any person who willfully violates this section" or "Any person who willfully violates the fiduciary obligations imposed by Section 501(a) of this Title" shall be guilty of a felony. That approach was indeed taken under many other provisions of the LMRDA. E.g. LMRDA Sections 209(d), 301(c), 303(b), 502(b), 503(c), 504(b), 601(b). Under Section 501, however, the crime is defined in terms of embezzling, stealing or converting the union's assets to one's own use or the use of another, without reference to the civil standards prescribed in Section 501(a). Inasmuch as the charge below erroneously defined the elements of the crime and failed to instruct the jury on the exculpatory elements properly requested, the conviction must be reversed.

III. THE COURT BELOW COMMITTED REVERSIBLE ERROR IN ADMITTING EVIDENCE OF LITERATURE DISTRIBUTED BY THE INTERNATIONAL UNION AND LECTURES BY UNION ATTORNEYS NOT SHOWN TO HAVE BEEN EITHER RECEIVED OR HEARD BY DEFENDANT OR RELEVANT TO THE CHARGES IN THE INDICTMENT.[6]

Over objection, the Court permitted testimony that from time to time the International Union with which Local 144 is affiliated distributed literature dealing with the LMRDA and had its attorneys address union officials on legal developments under that statute. Also over objection, the literature itself was admitted into evidence (20a-34a).

The purpose of this evidence was to show defendant's knowledge of the commands and prohibitions of the LMRDA provisions which he was charged with violating. In view of the lack of other evidence on this issue, and the demonstrated closeness of the case in the jury's mind, this evidence must be deemed material and any error in its admission highly prejudicial.

No proper foundation was laid for any of this evidence, no part of it was connected with defendant, no relevance was demonstrated, and no basis for its admissibility was shown. It should all have been excluded.

The only literature disseminated by the International Union shown to deal at all with the LMRDA provisions involved in this case was the full text of the entire LMRDA which was sent out in 1959 and admitted into evidence as Exhibit 47. But the testimony made clear that this was sent to Local 144 itself, not to the individual officers of affiliated locals (21a-23a). From the

6. This Point relates to all three Counts at issue and is incorporated by reference in Part 2 of this brief.

number of automobiles provided by the Local, we know that it had at least 16 officers and business agents. There is no evidence whatsoever that the text of the statute sent to the Local was ever given to or received by defendant. It is all very well to speak of permissible "inferences" (22a); but allowing documents into evidence on this kind of foundation encourages speculation run rampant.

The other exhibits emanating from the International Union are even more remote. Exhibit 47(a) deals with the applicability of the Act to Canadian locals and public employee unions and with questions concerning union elections and bonding requirements; Exhibit 47(b) deals with the requirement that unions adopt their own constitution and by-laws; Exhibit 47(c) deals with the bonding requirement; and Exhibit 47(d) also deals with Canadian locals, public employee unions, elections and bonding. None of these aspects of the Act has anything to do with the charges against defendant.

The vice in admitting these exhibits and the testimony concerning them lies in the fact that they create the impression that union officials of this International, including defendant, were kept apprised of their responsibilities under the Act and, therefore, that defendant had knowledge of the provisions underlying this indictment. In a short trial involving only a few counts, defense counsel may be able to point out the irrelevance of the only items of LMRDA-related literature shown to have been disseminated. Here, however, twenty-three counts were submitted to the jury, and the evidence at trial involved twenty-one additional counts. Many of the counts appeared far more serious than the three ultimately resulting in conviction, and evidence

concerning these other counts consumed most of the trial. The great bulk of the voluminous exhibits in evidence also dealt with other counts. In the limited time available for summation, therefore, defense counsel could not analyze each exhibit and each item of testimony and could not, therefore, demonstrate to the jury that the evidence emanating from the International did not show that defendant ever received information about any relevant provision of the Act.

The testimony as to attorney's lectures to union officials was equally irrelevant and equally inadmissible. First, there was testimony from at least three prosecution witnesses of an International meeting in Chicago in 1959. One, but only one, of the subjects considered at that meeting was the newly-enacted LMRDA. Defendant attended the Chicago meeting, but there is no evidence that he attended the session dealing with the LMRDA. Even a prosecution witness hostile to defendant testified that defendant customarily was in and out of meetings (50a; 57a; 63a; 64a). More important, there is no evidence that the portions of the LMRDA relevant to this case -- which constitute but a very small part of the entire statute -- were even mentioned. The written material subsequently sent out by the International only emphasizes that the International Union's principal concerns lay with other parts of the Act.

Finally, there was testimony that union attorneys reported to the International Executive Board on noteworthy new decisions under the LMRDA. Defendant became a member of the Executive Board in 1964. But even the attorney making these presentations, called as a Government rebuttal witness, could not identify the subjects or portions of the Act which were involved

in the cases which he discussed. Under the circumstances, the testimony was totally inadmissible, and its admission could only prejudice defendant by creating an impression in the jury's mind which the testimony itself did not warrant.

PART 2. THE RECORD-KEEPING COUNT

IV. THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THAT DEFENDANT KNOWINGLY AND WILLFULLY FAILED TO MAINTAIN RECORDS REQUIRED BY STATUTE TO BE MAINTAINED.

Section 206 of the LMRDA (29 U.S.C. §436) provides that "every person required to file any report" with the Secretary of Labor shall "maintain" records on the matters required to be reported from which the filed information may be verified, explained, clarified or checked and shall include "vouchers, worksheets, receipts." Section 209 provides that any person who willfully violates Title II shall be guilty of a crime.

Neither the statute nor the regulations promulgated under it define in any more precise or detailed manner the types of records required to be maintained or the scope, nature or comprehensiveness of the information to be contained therein.

It is undisputed that before receiving reimbursed expenses, defendant submitted a petty cash voucher, signed by him, setting forth the amount spent by him during the week, and categorizing the sums involved as "reimbursed expenses." These vouchers were maintained in the union records, were available for inspection by governmental agencies, and were introduced in evidence at trial (Exh. 12).

Defendant testified that he did not know that any other or further records were required to be kept (if, indeed, they were)

(354a-356a).

In an attempt to show that defendant knew of the requirements of Section 206 and knew that more extensive records were mandated, the prosecution relied upon the evidence of literature sent by Local 144's International Union and meetings held by the International on the subject of the LMRDA.

This evidence, if anything, only emphasizes the insufficiency of the record on the issues of knowledge and willfulness. For, as indicated above, the totality of the evidence gleaned from International officials and attorneys amounts to no more than the following: (1) in 1959 the International distributed to all Locals -- but not to individual officers -- the full text of the LMRDA; (2) three or four other pieces of literature on the LMRDA were also distributed over the years, but significantly none related to the record-keeping requirements of Section 206; they dealt exclusively with other aspects of the Act which from the outset drew the principal attention and aroused the major concern in union circles; (3) at a 1959 conference in Chicago called primarily for other matters, the LMRDA was discussed, but no witness could say that the record-keeping provision was even mentioned or that defendant attended any particular session; (4) from time to time International counsel reported on new judicial decisions under the LMRDA to the International Executive Board which defendant joined in 1964; but again there is no evidence that the record-keeping requirement was ever mentioned, and the lack of reported decisions under this section, particularly as compared to the large number of cases under other portions of the Act, makes it extremely unlikely that it was.

What emerges, therefore, is the actual fact; Section

206 is one of the least conspicuous, least known, least publicized, least considered, and least analyzed provisions of the Act. It has generated virtually no litigation, at least until the last two or three years; and even relatively well-informed union officials are likely to be unfamiliar with its terms.

One other point bears emphasis in this connection. Defendant was not the secretary-treasurer of the union in title or in fact, either during the period of the indictment or at any time since the enactment of the LMRDA in 1959. He was not the principal maker or keeper of the union records. His chief responsibilities lay outside the province of books and records.

Defendant was indicted because, as president, he was a required signatory of the financial reports filed annually by the union with the Secretary of Labor. (See Point VI, infra.) But he did not prepare these reports, he was not in charge of the books from which the fiscal information came, and there is no reason to doubt his testimony that he glanced at the reports only cursorily before signing them (224a; cf. 107a). Moreover, those annual reports, which are in evidence, contain no notice as to any requirement of maintaining records.

The only report containing any such statement is the LM-1, a one-time report filed by Local 144 in 1959 (Exh. 1G). The printed statement on maintaining records contains no indication of either criminal or civil penalties and is not bold-faced (as are other portions of the form dealing with statutory requirements) or otherwise calculated to draw special attention. Nor does it specify the extent of information required on "vouchers," any more than does the statute itself.

This Court has held that the "knowing" element of a

criminal violation may, in appropriate cases, be met either by actual knowledge or by "reckless disregard" in the sense of a "conscious purpose to avoid" learning the truth or a "wilful blindness to the existence of a fact." United States v. Abrams, 427 F.2d 86 (2d Cir. 1970), cert. den'd, 400 U.S. 832; United States v. Squires, 440 F.2d 859 (2d Cir. 1971); United States v. Jacobs, 475 F.2d 270 (2d Cir. 1973), United States v. Brawer, 482 F.2d 117 (2d Cir. 1973). Whether this concept is applicable to the record-keeping count and whether the judge's charge correctly explained it is considered in Point V below. But assuming arguendo its appropriateness, there is no sufficient evidence in this record that defendant either knew of the record-keeping requirements of Section 206 or that he had a conscious purpose to avoid learning of them.

V. THE COURT ERRONEOUSLY CHARGED THE JURY ON THE ELEMENTS OF "WILLFUL AND KNOWING" CONDUCT UNDER THE "FAILURE TO MAINTAIN RECORDS" COUNT.

In his charge, the trial judge sharply distinguished between the meaning of "willfully" under the "failure to maintain records" count and its meaning under all the other counts of the indictment. Under the record-keeping count alone, he said, neither evil purpose nor knowledge was required; "reckless disregard" would suffice.

The Court then proceeded to define "reckless disregard" as set forth at pp.16-17, supra.

In so charging the jury, the Court committed dual error. First, the charge improperly excluded the concept of evil or bad purpose which is a critical element of "willfulness" under the

LMRDA. Second, even if "reckless disregard" were an adequate substitute for knowledge and criminal intent, the charge so diluted and misdefined the meaning of reckless disregard as to make it virtually the equivalent of negligence.

A. The Court Erroneously Refused to Charge That Willfulness Requires Criminal Intent in the Sense of Evil or Bad Purpose.

In charging that willfulness under this one count would be satisfied by either knowledge or reckless disregard, with no requirement of bad purpose, the Court overlooked the teaching of the leading case of United States v. Murdock, 290 U.S. 389 (1933). Murdock is not only a seminal decision on the meaning of "willfully" in criminal statutes generally; more important, the statutory provisions there involved were strikingly similar to those at bar.

In Murdock, defendant was convicted of violating sections of the Revenue Act which required the filing of certain returns, authorized the Commissioner to examine books, papers, records and memoranda bearing upon the matters required to be reported, and provided that anyone who is required to pay taxes, make a return, supply any information or "keep any records" and who willfully fails to do so shall be guilty of a misdemeanor (290 U.S. at 392). The Supreme Court described the statute as follows (p. 396):

> "The Revenue Acts command the citizen, where required by law or regulations, to pay the tax, to make a return, to keep records, and to supply information for computation, assessment or collection of the tax. He whose conduct is defined as criminal is one who 'willfully' fails to pay the tax, to make a return, to keep the required records, or to supply the needed information" (emphasis supplied).

Notwithstanding the fact that defendant had acted intentionally, deliberately and without legal justification, the Court reversed Murdock's conviction because of the trial judge's failure to charge that willfulness requires an evil intent or bad purpose. Said the Court (290 U.S. at 395):

> "This court has held that where directions as to the method of conducting a business are embodied in a revenue act to prevent loss of taxes, and the act declares a willful failure to observe the directions, a penal offense, an evil motive is a constituent element of the crime."

The terms, purposes and structure of Title II of the LMRDA are closely analogous. Reports are required to be filed with a governmental agency as a means to assure that the union funds are properly accounted for and expended in accordance with the union constitution, the statute, and the fiduciary obligations imposed by law. The requirement that records be maintained -- the "directions as to the method of conducting a business" in the words of Murdock -- are intended to enable the Secretary of Labor, the Department of Justice, and the members of the union to insure that the substantive standards are met. H. Rep. No. 741, 86th Cong. 1st Sess., pp. 8-9 (1959).

The Murdock holding as to the criminal intent required by the term "willfully" has been consistently reiterated and followed. See e.g. Morissette v. United

States, supra, 342 U.S. 246.[7] Its disregard herein requires reversal of defendant's conviction under Count 10.

B. Assuming Arguendo That the Concept of "Reckless Disregard" Is Appropriate to the Record-Keeping Charge, the Trial Court Erroneously Defined "Reckless Disregard" and Diluted Its Meaning to the Virtual Equivalent of Simple Negligence.

Within the last several years, this Court has had several occasions to consider the concept of "reckless disregard" as a part of the charge to a jury in a criminal case. It has emhpasized that this concept is not to be indiscriminately used, but may be appropriate in some cases.

As we read the Court's decisions, "reckless disregard" has reference to the requirement of "knowledge" rather than "willfulness." E.g. United States v. Brawer, supra, 482 F.2d 117, 128; United States v. Jacobs, supra, 475 F.2d 270. "Knowing" conduct may in certain circumstances be conduct pursued in reckless disregard of the facts rather than with actual knowledge. But this does not negate the requirement of bad purpose imparted

7. In United States v. Budzanoski, 462 F.2d 443 (3d Cir. 1972), the Third Circuit held, in a charge of falsifying financial records under the LMRDA, that "willful" did not require evil or bad purpose. The Third Circuit seemed to say that otherwise union officials might not be held to their fiduciary responsibilities, overlooking entirely the array of civil remedies available under the Act. The Court observed (p. 452) that "the elimination of a requirement of evil intent or bad purpose will not operate as a trap for the unwary. There can be no basis for asserting a lawful purpose for the knowing entry of deceptive statements or the omission of accurate ones in books of account." Whatever the validity of these comments as addressed to false or deceptive entries, they have no application to a charge of simple failure to "maintain" -- in the sense of "create" -- records allegedly required, unaccompanied by any allegation of falsity, inaccuracy, deception, misrepresentation, concealment or destruction in the making or keeping of any records.

by the term "willfully," for a "conscious purpose to avoid learning the truth" may well be the handmaiden of bad motive and criminal intent.

Assuming arguendo, however, that this were an appropriate case for charging "reckless disregard" and that "reckless disregard" itself substitutes not only for actual knowledge but for bad purpose and evil intent, the trial judge's definition of "reckless disregard" departs so substantially and prejudicially from this Court's admonitions that the conviction cannot stand.

In United States v. Abrams, supra, 427 F.2d 86, 91, the Court approved a charge that the jury could regard the "knowing" requirement as satisfied by "evidence that appellant acted with reckless disregard of whether the statements made were true and with a conscious purpose to avoid learning the truth." In United States v. Squires, supra, 440 F.2d 859, 864, footnote 12, the Court reapproved this formulation, underscoring the clause on "conscious purpose to avoid learning the truth." The Squires charge was itself condemned as erroneous because of "the failure to require 'conscious avoidance' by Squires both as to what the form said and as to the import of the cited statutes in relation to his certification."

In United States v. Sarantos, 455 F.2d 877, 881-882 (2d Cir. 1972), the Court, after reviewing its prior decisions, emphasized the importance of using both phrases "reckless disregard" and "conscious purpose to avoid learning the truth" and expressed its definite preference that the two clauses be joined by the conjunctive "and" so that the jury will be impressed with the "importance of finding a deliberate disregard of the facts." In United States v. Jacobs, supra, 475 F.2d 270, a charge

cast in these terms was approved; the Jacobs charge also emphasized that "Guilty knowledge cannot be established by demonstrating merely negligence or even foolishness on the part of a defendant." See also United States v. Brawer, supra, 482 F.2d 117.

The charge herein totally ignores the guidelines set by this Court in at least two important respects. First, it omits any reference to a "conscious purpose to avoid learning the truth," thus failing to supply the emphasis which this Court deemed so important in Sarantos.

Second, the trial judge's reference to negligence or oversight was so diluted, internally inconsistent and erroneous as to leave the net effect of his instructions on willfulness under this count in total confusion, or worse.

The Court charged that

> "Knowledge and wilfulness may not be established if the failure to maintain the required records resulted from mere negligence or oversight, especially if the defendant had made reasonable efforts to know his fiduciary obligations as a union officer." (1533a-1534a) (emphasis supplied)

The last portion of this sentence wholly neutralized and nullified the first. For what is a failure to make "reasonable efforts" to know one's fiduciary obligations but negligence? What the charge says is that negligence is not enough, if the defendant made reasonable (that is, non-negligent) efforts to know. Or to reduce the equation further, negligence is not enough, unless the defendant was negligent in failing to know his obligations. As the Fourth Circuit recently held in United States v. Williams, 478 F.2d 369, 373 (4th Cir. 1973), in reversing a conviction where the judge's charge used the similar phrase "knew or should have known": "[T]he jury could have

convicted appellants if they found that Williams was guilty of nothing more than negligence in the handling of the bank's affairs."

Indeed, given the emphasis inherent in a clause preceded by the word "especially," a lay jury could only conclude that it might find Ottley guilty if he failed to make "reasonable efforts to know his fiduciary obligations as a union officer."

Contrast this with the charge in Jacobs, for example, 475 F.2d 270, 287, footnote 37, in which the exculpatory reference to "negligence" or "foolishness" was unaccompanied by any inculpatory or neutralizing language. Contrast it further with the care manifested in this Court's opinions in Abrams, Squires, Sarantos and Jacobs, supra, to emphasize that absent actual knowledge only a "conscious purpose" to avoid learning the truth or a "deliberate disregard" will suffice.

Whatever other language the trial judge used in his brief one-page charge on knowledge and willfulness under the record-keeping count, this confusing, self-contradictory paragraph enunciated a wholly erroneous standard and permitted conviction based on conduct -- and state of mind -- which fails by a wide margin to meet the minimum standards set by this Court.

Bearing in mind that the jury had the entire charge re-read to it and that it reported an irreconcilable division prior to its ultimate verdict, the error must be regarded as highly prejudicial.

VI. DEFENDANT IS NOT A "PERSON REQUIRED TO FILE REPORTS" UNDER THE LMRDA AND IS THEREFORE NOT DIRECTLY SUBJECT TO THE RECORD-KEEPING REQUIREMENT OF SECTION 206 OF THE ACT. THE CONVICTION CANNOT BE SUSTAINED UNDER 18 U.S.C. SECTION 2, BECAUSE THE CASE WAS NOT PRESENTED TO THE JURY ON THAT THEORY AND THE CHARGE DID NOT COVER THE MATERIAL ELEMENTS UNDER THAT SECTION.

Defendant himself was not a "person" required to file financial reports under Section 201 of the LMRDA and hence was not directly subject to the record-keeping requirements of Section 206. Section 201(b) of the Act, the alleged source of the obligation in this case, imposes the duty to file union reports upon the "labor organization" itself ("Every labor organization shall file annually with the Secretary ..."), and Section 206 imposes the record-keeping responsibility upon any "person required to file any report." The word "person" is appropriately used in Section 206, since that Section also covers employers, surety companies, union officer recipients of loans, and labor relations consultants, who are subject to the reporting provisions of Sections 202, 203(a) and (b) and 211; and "person" is broad enough to embrace all such individuals, organizations, and companies.

Throughout Title II of the Act, Congress carefully and precisely spelled out the parties subject to the various reporting requirements prescribed in that Title. Moreover, when Congress wished to place a duty to file reports upon officers of a labor organization as distinct from the organization itself, it said so plainly and directly. For example:

Section 201(a). "Every labor organization shall adopt a constitution and by laws and shall file a copy thereof with the Secretary, together with a report, ..."

Section 201(b). "Every labor organization shall file annually with the Secretary a financial report ...."

Section 202(a). "Every officer of a labor organization and every employee of a labor organization ... shall file with the Secretary a signed report ...."

Section 203(a). "Every employer who in any fiscal year made ... shall file with the Secretary a report ...."

Section 203(b). "Every person who pursuant to any agreement or arrangement with an employer undertakes activities ... shall file ... a report with the Secretary ...."

Section 207(a). "Each labor organization shall file the initial report required under section 201(a) within ninety days ...."

(b) Each person required to file a report under section 201(b), 202, 203(a), the second sentence of 203(b) or section 211 shall file such report within ninety days ...."

Section 211. Every surety company which issues any bond ... shall file annually with the Secretary ...."

Under Section 201(b) the president and treasurer of the labor organization must sign the annual report (LM-2), and under Section 209(d) of the Act (29 U.S.C. §439 (d)), each mandatory signatory is responsible for the filing of the reports and any false statements contained therein. Nevertheless, it is plain that the "person required to file" the annual financial reports under Section 201(b) is the labor organization itself; and thus the record-keeping duty created by Section 206 is that of the union, not any particular officer.

There is a very real distinction, apparent throughout Title II, between the "person required to file," that is, the

"persons" enumerated in the various sections set forth above, and one who is "responsible" for seeing to it that the "person required to file" does file.

If there were any doubt that Section 209(d) does not transform a union president or treasurer into a "person required to file any report" within the meaning of Section 206, it is dispelled by Section 207(b). For Section 207(b), using virtually the identical words found in Section 206, and the same verb "required," applies to "Each person required to file a report" annually. It then proceeds to enumerate the sections under which "persons" are "required" to file annual reports. Pointedly omitted is any mention of Section 209(d).

Apart from the plain language of the statute itself, any other construction would create an anomaly. As a signatory to the union's financial reports, a union president would be responsible not only for the preparation and submission of his own vouchers, but for insuring that all other officers prepare and submit adequate "vouchers" within the meaning of the statute, whatever that may be. Yet most union presidents, like defendant herein, have no powers or responsibilities under the union's constitution to oversee the kinds of records made and submitted by other officers or to require them to adhere to any particular standards. This is simply not the usual role of presidents of labor organizations any more than of business corporations; and there is no indication in the history of the LMRDA that Congress intended to impose this duty upon them, with criminal sanctions in case of breach.

This does not mean that a union officer is immune from criminal liability if the union breaches the record-keeping

requirements of Section 206. For Title 18 U.S.C. §2 provides generally that any person who "willfully causes" another person to commit a crime is guilty as a principal. Count 10 of the indictment does cite Title 18 U.S.C. §2 as one of the statutory provisions implicated in the alleged violation therein charged.

Indeed, during the argument on the motion to dismiss at the end of the Government's case, this is precisely the approach Judge Frankel took. When Government counsel contended that the president was directly subject to the record-keeping requirement of Section 206 of the Act, the judge indicated that he viewed the count somewhat differently and denied defendant's motion on the ground that he could be "a causer" under 18 U.S.C. §2 (137a-139a).

In delivering his charge to the jury, however, the judge apparently changed his mind and instructed that defendant, as president of the union, was directly subject to the record-keeping requirements of Section 206 of the Act (388a; 410a-412a). Accordingly, 18 U.S.C. §2 was not mentioned in the charge under Count 10, and the jury was given no opportunity to determine whether defendant did any of the things necessary to bring his conduct within that Section.

We submit that the judge's original view was correct and his ultimate charge erroneous. The only way defendant could be held criminally liable for failure to maintain records under Section 206 was through operation of 18 U.S.C. §2, and this would have required a charge appropriately tailored to explain, and submit to the jury, the issues raised by that provision of the Criminal Code. No such charge having been given, and the charge having adopted an erroneous view of the LMRDA, the conviction

under Count 10 must be reversed.[8]

VII. THE PETTY CASH VOUCHERS SUBMITTED WEEKLY BY DEFENDANT SATISFIED THE STATUTORY REQUIREMENT. TO CONSTRUE THE GENERAL LANGUAGE OF SECTION 206 AS DEMANDING MORE DETAILED INFORMATION IS TO CREATE A "TRAP FOR THE UNWARY" AND TO RENDER THE STATUTE VOID FOR VAGUENESS.

A. The Undefined Statutory Term "Voucher"

With no guidance other than the statutory language itself, the trial judge submitted to the jury the issue whether the petty cash vouchers presented each week by defendant constituted "vouchers and receipts" within the meaning of Section 206 (413a-414a). In so doing, he permitted the jury to speculate on the meaning of terms which Congress chose not to define or elaborate.

A voucher is generally understood to be a requisition of, or receipt for, funds which identifies the person who seeks

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8. Had the trial judge adhered to his original view that defendant might be held as a "causer," he would have had to charge, among other things, that in order to convict, the jury must find that defendant acted "willfully" within the meaning of 18 U.S.C. Sect. 2(b), a general criminal statute which requires "willfully causing" another to commit a crime. If the word "willfully" does indeed have different meanings in different contexts, as Judge Frankel charged, then its 18 U.S.C. Section 2 meaning, which requires actively causing another to do something rather than passively failing to maintain records, must be the meaning it bears generally in criminal statutes, that is, the meaning ascribed to it in Murdock and Morissette, and not that attributed to it in the charge actually given under Count 10.

or receives payment, the amount involved, and its general purpose.[9] Defendant's vouchers conformed to that description and also served as the receipt for the sums disbursed to him by the union. It is only in the formulation of the general purpose -- "reimbursed expenses" -- that defendant failed to provide details which the Government claims to be necessary on pain of criminal penalty. Yet the term "voucher" itself conveys no standard or guideline as to the degree or kinds of detailing required. Moreover, there is no dispute that the types of expenditures which defendant covered by this term -- taxis, telephones, parking, meals, and the like -- are accurately and customarily embraced within the term petty cash "reimbursed expenses" and are distinguished from other expenses like airline tickets, auto repairs and maintenance, hotel bills, and similar items which are usually itemized and treated separately.

Neither by statute nor through regulations have union officials been apprised of the nature and scope of the information to be "maintained" pursuant to Section 206.[10] In United States v. Budzanoski, supra, 462 F.2d 443, a false entry case, the Court

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9. The Random House Dictionary of the English Language defines "voucher" simply as "a document, receipt, stamp, or the like, which gives evidence of an expenditure."

Webster's Third International Dictionary defines "voucher" as "a documentary record of a business transaction (cancelled checks are often called vouchers because they offer proof of payment) ...."

10. Section 206 of the LMRDA contrasts sharply with other record-keeping requirements under federal law which set forth in precise detail the information which must be reflected in the records to be kept. See, e.g., 26 CFR Part 31, Subpart G, Reg. §31.60001-2 (Social Security); 29 CFR Part 516, Subpart A (Wages and Hours).

discussed the record-keeping requirement as follows:

> "Although no particular bookkeeping system is mandated by these provisions, when they are read in light of the legislative purpose, it is clear that whatever system is adopted, it must be able to give anyone reviewing the records an accurate picture of all the financial operations the union has undertaken. United States v. McCarthy, 422 F.2d 160, 162-63 (2d Cir. 1970), appeal dismissed, 398 U.S. 946 (1970); United States v. Haggerty, 419 F.2d 1003, 1008 (7th Cir. 1969), cert. denied, 397 U.S. 1064 (1970); Rekant v. Rabinowitz, 194 F. Supp. 194 (E.D. Pa. 1961).
>
> "Further, if the union sees fit to institute some system which preliminarily tabulates those receipts and expenditures, for instance through a set of monthly financial statements, they, too, must be retained. Section 206 underscores Congress' intention to provide anyone auditing union books with a means to check the calculations used to arrive at the annual report. Records which 'provide in sufficient detail the necessary basic information ... from which the documents filed with the Secretary may be ... checked for accuracy and completeness' logically include those documents which would show an auditor the preliminary summaries of calculations and accounting used to translate individual transactions into a final summary. Without the retention of such documents, a check for accuracy and completeness would become immeasurably more complex and the ability to obscure or hide improper dealings would undoubtedly increase.
>
> "Therefore, unions are required to retain: (1) accurate, contemporaneous records reflecting all union receipts and disbursements; (2) supporting documents reflecting the entry of transactions into the union's accounts and their reproduction in the annual financial statement; and (3) any interim financial records that can serve to check that annual report. Applying these accounting principles to this case, there is no doubt that the vouchers and monthly statement had to be accurate and retained. As to the vouchers, there is no adequate alternative statement to record the purpose of the payment of funds to Pellegrini and Halvonik. Although later monthly statements may have accounted for the funds, the March statement, even in conjunction with the other statements, presents an inaccurate version of the union's financial operations."

If these are the requirements imposed by the ambiguous terms of Section 206, then defendant fully complied with them. His petty cash vouchers for reimbursed expenses were accurate and contemporaneous; there is no claim that the figures were not

entered accurately into the union's books of account or that interim financial records were not kept; and all records were retained by the Local. Inasmuch as "no particular bookkeeping system is mandated by these provisions," the Court below erred in permitting the jury to speculate as to whether the petty cash vouchers submitted by defendant satisfied the undefined statutory term "voucher" in Section 206.

B. The Meaning of "Maintain"

Section 206 contains other ambiguities. For example, its operative verb is "maintain." The verb "maintain" generally signifies retention or preservation of what is already in existence, rather than causing something new to be created, made or brought into being.[11] The Budzanoski opinion, supra, also emphasizes the concept of retention. The Government must necessarily contend that in Section 206, the word "maintain" has the meaning of creating something new, for otherwise defendant has been guilty of nothing. No union records have been destroyed, concealed or even misplaced. All union records that existed have been preserved and produced.

Under the expansive reading given Section 206 by the Court below: (1) the command to "maintain" records means not to retain and preserve them, but to cause them to be created and submitted; and (2) the undefined term "voucher" means something

11. E.g., New Century Dictionary: "to keep in existence or continuance (as to maintain a state of affairs, an attitude, relations, etc.); to preserve; retain; also, to keep in due condition, operation, or force ...; keep unimpaired."

The Random House Dictionary of the English Language: "1. To keep in existence or continuance; preserve; retain."

more than a requisition or receipt for moneys, showing the amount, general nature and requisitioning party; although how much more must be shown remains unspecified.

We need not belabor the point that this is a criminal statute. What Congress has failed to prescribe cannot be provided by the courts. Viereck v. United States, 318 U.S. 236, 245 (1943); United States v. Ferrara, supra, 451 F.2d 91. Nor can criminal juries be permitted to decide what Congress had in mind when the statute itself does not say.

Lacking further elucidation in Section 206, any other portion of the statute, or any regulation promulgated under it, the requirement of maintaining records can survive as a valid statute only if confined to the preservation of the simple, basic, rather general records which a layman without formal education and unsophisticated in bookkeeping would understand by the terms used. To the extent that defendant was subject to Section 206 at all, he complied with this requirement; and the jury should not have been given the case to speculate whether Congress may have had something more in mind.

C. The Expansive Construction Underlying This Prosecution Would Render the Statute Void for Vagueness.

Any other construction of Section 206 renders it void for vagueness.

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and juries to decide, without any legally fixed standards, what is prohibited, and what is not in each particular

case." Gaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966); see also Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Construction Co., 269 U.S. 385 (1926); United States v. Cohen Grocery Co., 255 U.S. 81 (1921). Such a law, in the language of the cases, becomes a "trap for the unwary."

Defendant does not stand in the position of a union officer accused of making false entries in records required to be kept who contends that the statute did not sufficiently inform him of the records subject to the statutory record-keeping mandate. In such circumstances two courts have responded that one who knowingly makes a false, deceptive entry cannot complain that he is being entrapped by a statute which does not clearly define the scope and nature of the records to be kept. United States v. Budzanoski, supra, 462 F.2d 443; United States v. Haggerty, 419 F.2d 1003 (7th Cir. 1969), cert. den'd, 397 U.S. 1064.

In this case, however, the ambiguity of Section 206, if construed to require the creation of vouchers more detailed than those submitted by defendant, goes to the very heart of the charge. For defendant is not accused of making false, misleading or inaccurate records. He is accused of furnishing vouchers unchallenged as to accuracy, but allegedly deficient in details. Inasmuch as the statute provides no standard as to the kinds of bookkeeping or the degree of detailing required, it cannot, consistent with constitutional requirements of precision, make criminal the record-keeping practices for which defendant has been convicted. Either the statute must be construed as to require no more than defendant did or it must be invalidated on grounds of vagueness.

VIII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE INTRODUCTION AND EXCLUSION OF EVIDENCE.

A. Point III Applies to Count 10 as Well

Point III under Part 1 of this brief dealing with the erroneous admission into evidence of union-distributed literature and union testimony concerning lectures and reports on the LMRDA applies to all three counts in issue. We incorporate it by reference herein.

B. The Trial Court Erred in Excluding Evidence That Internal Revenue Service Representatives Had Accepted Defendant's Method of Documenting Petty Cash Reimbursed Expenses as Adequate Substantiation of the Expenditures Made.

When defendant took the stand, the defense sought to adduce testimony that in 1959 the Internal Revenue Service raised a question as to his reimbursed expenses and that after he had submitted a memorandum to the IRS, they accepted his method of documentation as adequate substantiation and took no further action. Defense counsel stated to the Court that the purpose of this testimony was to amplify and explain defendant's testimony that he did not believe any more detailed records were necessary. The defense urged that this bore directly on defendant's state of mind and was highly relevant on the issue of knowledge and willfulness under Count 10 (169a-173a).

The judge's initial reaction was that this "was about as lousy a reason as he could have formulated" and "That the IRS told him he could do it borders on fantasy" (171a). He then inquired whether defendant could supply the name of the IRS

representative with whom he dealt, apparently on the theory that without that name, the Government could not meet the proferred testimony (171a-172a). After a brief additional colloquy, and without ascertaining whether either defendant or the Government could identify the IRS representative who audited defendant's return, the Court excluded the entire line of testimony on the ground that "There is a limit to the kind of advice I will allow as a basis for people's good faith. I think this exceeds the limit. I will exclude it" (173a).

As indicated above, the facts under the record-keeping count were not in dispute. Apart from issues as to the meaning, scope and applicability of the statutory provisions, the principal jury issue was defendant's state of mind, that is, whether he was guilty of knowing and willful conduct. And whatever the precise legal standard applicable to this issue, there can be no doubt that evidence bearing on defendant's good faith, explaining why he kept the kinds of records he did, and negating any reckless, conscious disregard of legal obligations, would be vital to his defense.

The credibility of such testimony has no bearing on its admissibility. Nor does any supposed difficulty in rebutting it; although we find it hard to believe that the Internal Revenue Service does not keep readily ascertainable records showing whether a particular taxpayer was audited during a particular year, and, if so, the name of the revenue agent performing the audit.

Thus the only possible excuse for excluding this evidence is the claim that it would not supply a basis for good faith belief on defendant's part and that the jury should not be

permitted to so consider it.

Lacking further elucidation, we can only assume that the judge meant that advice as to the adequacy of expense records from an IRS representative could not, as a matter of law, have any bearing upon defendant's state of mind as to their adequacy under another statute, the LMRDA.

It may be obvious to judges and lawyers that IRS representatives, in advising as to the adequacy of expense records, are not purporting to pass upon their adequacy under another statute; but it is by no means obvious to laymen. Such a view fails to comprehend the role which the IRS plays in the minds of laymen. For many years the IRS was the sole agency with which laymen, including union officials, dealt in connection with their reimbursed expenses and the adequacy of the substantiation of these expenses. Even with the passage of the LMRDA, there is no systematic or periodic review by the Department of Labor of the record-keeping or expense payments of labor organizations. There is no evidence, for example, of any contact between the Labor Department and Local 144 until the investigation leading to this indictment.

In arguing for the admissibility of this evidence, defense counsel contended (171a):

> "He figured if it was all right with them, it would be all right with a department of government. The IRS is watchdogs of people."

This accurately portrays the perception of the role of IRS in the minds of the lay public. The proferred testimony, it must be recalled, dealt not with defendant's tax affairs generally, but with the very reimbursed expenses which were the subject of Count 10. If the IRS accepted their substantiation as

adequate, it is at least fair argument to the jury that this tends to negative the willfulness or reckless disregard which the judge discussed in his charge. While no one can say how the jury would have viewed this argument, given the critical importance of defendant's state of mind under Count 10 and the closeness of the case manifest from the course of the jury's deliberations, it was reversible error to deprive defendant of the opportunity to present this contention to the jury.

In United States v. Matot, 146 F.2d 197 (2d Cir. 1944), this Court, speaking through Judge Learned Hand, reversed a conviction because of the exclusion of a conversation which defendant proferred as evidence of his good faith. The Court noted that the case was close and "[A]ny evidence of Matot's good faith was highly important" (p. 198). After observing that the evidence might be read as confirming defendant's denial that he contemplated a fraud, the Court held:

> "That possibility appears to us enough, especially in so close a case, to entitle him to lay the interview before the jury to interpret as they would" (p. 198).
>
> * * *
>
> "The exclusion of evidence, which does not too much entangle the issues and confuse the jury, merely because of its logical remoteness from the issue, is always a hazard and is usually undesirable. It is always hard to say what reasonable people may deem logically material, and all doubts should be resolved in favor of admission, unless some definite rule like that against hearsay, makes that impossible" (p. 199).

That principle is equally applicable herein.

CONCLUSION

For all the foregoing reasons, we respectfully urge that the judgment of conviction against defendant be reversed.

Respectfully submitted,

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